IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

ELLA L. WIGGINS,
Petitioner,

v.

ELIZABETH LIGGETT KENNARD,
Respondent.

No. 224.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

This brief will reply to statements and contentions for Respondent, in substantially the same sequence adopted in Respondent's "Brief in Opposition" (also referred to as "Resp.'s brief").

All italics herein are ours unless otherwise indicated.

(1) **The statements** (Resp.'s brief, pages 1-7; 8-12; 17), **that no federal question was ruled upon by the State Supreme Court, or was properly or timely presented, are incorrect.**

(a) In Petitioner's motion for rehearing addressed to the first decision (opinion) of the State Supreme Court in

the instant case, she contended (R. 272-273): that the appeal then pending presented the first opportunity since the appeal from the will decree, to have said State Supreme Court construe the entire will and thus decide the intent of the disputed paragraph of the will which said court had not specifically construed in its opinion affirming the will decree; that unless the court should grant a rehearing of the appeal in the instant Kennard case and upon such rehearing should specifically construe the intent of the will from its four corners instead of resting its decision upon the cited Missouri statutes, as said court had done in its first decision in this Kennard case,—Petitioner *would not have had an adequate hearing* nor "her *full day in court*" in said case; and partly for this reason Petitioner prayed a rehearing. While the federal constitution was not expressly cited nor involved in the motion, the claim of a federal right was inherent in above contention and the primary purpose of said motion was to persuade the State Supreme Court to construe the will from all of its provisions, and thereby to give Petitioner her full day in court.

In the same motion (R. 273) Petitioner contended also, that Mrs. Kennard had had a Missouri statutory right (familiar to said court) during three years after she had attained the age of twenty-one years, to have the will decree reviewed, by the State Supreme Court. Respondent's failure to prove an adequate excuse for her own negligence in not having resorted to this available and adequate statutory remedy, was fatal in equity to a recovery by her in the instant Kennard case, (Point II of Petitioner's brief in support of the petition herein, pp. 8-12). The presence of these contentions in Petitioner's said motion for rehearing, was a warning to the State Supreme Court, that by ruling against them it would be acting arbitrarily and in violation of her constitutional rights.

The State Supreme Court denied said motion (R. 351),

and thereby ruled against said contentions, and in its first modified decision (of December 16, 1941; R. 351-363), said court gave no effect to either of said contentions.

(b) In Petitioner's motion for rehearing addressed to said first modified decision, she expressly invoked the due process clause of the federal Constitution, on the ground of arbitrary action in several respects, (R. 366-368; 369; 371-372), and prayed a rehearing for reasons including those involving "due process".

(c) Again, in Petitioner's motion to transfer to the court in banc (R. 375), filed coincident with her said last above motion for rehearing, she contended that the cause involved a specific federal question (R. 380), and asked a transfer partly on that mandatory ground.

The State Supreme Court denied both of said motions (R. 392-393), *thereby ruling* against said federal question.

(d) Again, in Petitioner's motion for rehearing, addressed to the second modified (final) decision of said State Supreme Court rendered February 26, 1942, (R. 393-405), she contended on various grounds (R. 409-419; 420; 423; and 424), that said decision had denied to her the due process of law to which she was entitled under the federal Constitution.

The State Supreme Court denied said motion on April 16, 1942, (R. 440-441), and *thereby ruled upon* said federal question.

(e) That the federal question was raised in time although not raised until the instant case had reached the State Supreme Court, is shown in Petitioner's supporting brief, (Point V, pages 32-34). The authorities cited and argument made there adequately refute the contentions *contra* in Respondent's opposition brief, which need not be further replied to here.

(2) **The fact** (Resp.'s brief, page 6) **that the State Supreme Court did not modify its judgment of affirmance entered July 25, 1941, during the later period while it was making substantial changes in the legal and factual grounds upon which to finally rest said affirmance, constitutes no reason why the instant petition should be denied.**

While the first and second editions of the decision of the State Supreme Court show the course of its progress in seeking grounds satisfactory to it upon which to rest its final decision and its said judgment of affirmance, there can be no doubt that its last decision rendered on February 26, 1942 (R. 392), constituted *the decision of the court* upon which said judgment of affirmance rests.

That the State Supreme Court so regarded its second modified opinion is shown by the fact that against the objection of counsel for Respondent to the filing of Petitioner's motion for rehearing addressed to said decision (R. 406), said court granted Petitioner leave to file said motion (R. 405). Moreover, it is in accord with reason and the general rule, that a substantial *(material)* change made by a court in its earlier form of a decision or judgment causes the amended form to become *the decision* or *judgment of the court;* 4 C. J. S. pages 899-900, Section 440 and cases cited thereto, including *Donnell v. Goss,* 166 N. E. 725, at 726, 267 Mass. 444, at 446; *Hewey v. Andrews,* 159 Pac. 1149, at 1150, 82 Ore. 448, at 451.

If, as Respondent seems to contend, the judgment of affirmance were to rest on the first opinion of the State Supreme Court, then it would have no valid support because said opinion was abandoned by said court, the judgment would stand of record without a supporting opinion, and would therefore violate the requirement of the State Constitution (Section 3 of Amendment of 1890 to Article VI of Constitution of Missouri; Rev. Stats. of Mo., 1939,

Vol. I, pages 126c-127c), which requires that "the opinion of each division shall be in writing, and shall be filed in the causes in which they shall be respectively made", etc.; it would also violate the requirement of Section 1233, Rev. Stat. of Mo. 1939, Vol. I, page 347, which provides that in each case determined by the Supreme Court "the opinion of the court shall be reduced to writing and filed in the cause, and shall show which of the judges delivered the same, and which concur therein or dissent therefrom"; also the requirement of Section 1234, Rev. Stat. of Mo., 1939, Vol. I, page 347, which provides that said opinion "shall always contain a sufficient statement of the case, so that it may be understood without reference to the record and proceedings in the same."

(3) **The contention** (Resp.'s brief, pages 4, 8, 18), **that by Petitioner's waiver contained in her motion for rehearing** (R. 255) **addressed to the first decision of the State Supreme Court, she forever waived her right to complain of the action of the State Supreme Court in the instant Kennard case, in affirming the decree of the state circuit court "voiding" the disputed paragraph of the will decree—is without merit.**

It overlooks the fact that said waiver was conditional, not absolute. It was expressly limited to a specified purpose, for which the State Supreme Court refused or failed to use it. It was expressly conditioned on the State Supreme Court doing in the instant case what it had not done in the appeal from the will decree, namely, specifically construing the disputed paragraph of the will from *all* its provisions. But said court refused to comply with said condition, so the waiver became ineffective. The stated subject matter of the waiver was (italics ours):

> "*Whether the Court was free to construe the will* because *of the contention* heretofore made, *that the*

will construction decree is binding on plaintiff" (R. 255).

And the language of the waiver was (R. 255-256):

> "Since it is evident from the Opinion that the Court thinks the will *should be construed in order to do equity between the parties, Mrs. Wiggins and her counsel are willing to, and do hereby, waive this point in order that this Court may do what it has not yet done, namely, construe the will from its four corners and specifically consider and determine the testator's intent as expressed in all of the provisions of the will particularly the provisions other than the use of the term 'heirs of the body'.*
>
> "While we are still of opinion, with great respect for the Court, that the decree is binding on plaintiff, *our views on this subject will be indicated in a separate motion,* but nothing contained in said separate motion is intended to prevent the Court from having complete freedom upon this appeal to construe the will as above suggested."

In harmony with the above conditional waiver, said motion for rehearing prayed that the court

> "Reset the case for argument solely upon the intent of the testator as disclosed by all the provisions of his will, in order that the Court may, upon briefs and argument, consider and specifically decide what Mr. Liggett intended by his will in respect of the disposal of the disputed share of the income. When this shall have been done Mrs. Wiggins will have had her full day in this Court, but it is respectfully submitted that she will not have an adequate hearing on this subject if the Opinion recently delivered remains in effect by adjudging that without regard to the real intent of the testator Mrs. Kennard is entitled to the disputed income solely because of the existence in the will of the term 'heirs of the body' " (R. 273).

It is respectfully submitted that upon the above record facts, there was no such unconditional waiver as Respondent contends in her opposing brief herein.

(4) **The contentions** (Resp.'s brief, pages 7-8) **that decisions by a state court on a question of res judicata, or on the proper construction of the will of a resident of Missouri are matters of local law and do not present federal questions, are irrelevant to the instant petition.**

None of the reasons or grounds set out in the instant petition (Petition herein, pages 33-36), rest at all upon any attempt to invoke the doctrine of res judicata, or to contend that the construction of state wills involves a federal question; (on the latter point, see Petitioner's supporting brief, page 34).

(5) **The contention for Respondent** (Resp.'s brief, page 10) **that the denial by the State Supreme Court of Petitioner's motion to transfer the instant Kennard case to said court in banc, "presents no question for review by this Court,"—is without merit.**

That the duty of said court to make such transfer was mandatory under the state constitution, is shown in Point I of Petitioner's supporting brief herein (pages 6-8).

The statement in support of Respondent's above contention (Resp.'s brief, page 11), that "*Both of Appellant's motions to transfer* the cause to the Court in Banc *were based upon and addressed to the discretionary power* of the court",—*is incorrect in fact,* being true in part only.

Petitioner filed two motions to transfer. The first such motion followed the first modified decision of the State Supreme Court. It accompanied Petitioner's motion for rehearing addressed to said decision; it invoked both the discretionary (R. 376-380) *and the mandatory* (R. 380) *power* of said court under the state constitution; and it

showed (partly by reference to said motion for rehearing) that a federal question was involved, (R. 379-380).

Because a federal question was involved it became the duty of said court, imposed by the mandate of the state constitution, *to forthwith make the transfer.* Such a transfer was a part of the due process prescribed by the state constitution and to which Petitioner was entitled as a matter of right. By denying said motion (R. 392-393) and thereby refusing to make the transfer, said court denied to Petitioner the due process of law guaranteed to her by the federal Constitution. This right arose upon said denial and still exists. It was not destroyed by the fact that the State Supreme Court abandoned its first modified decision and rendered its second modified decision. Said denial of this right, in and of itself, affords an adequate reason for the granting of the instant petition.

Petitioner's second motion to transfer followed the second modified decision of the State Supreme Court, and accompanied her motion for rehearing addressed to said final decision; (R. 407-430). Said motion for rehearing specified five different respects in which said decision had denied due process to Petitioner, (R. 409, 420, 423, 427 and 428), in violation of the federal Constitution.

Petitioner's accompanying motion to transfer (R. 433-434), expressly invoked the discretionary power only, of said State court, but *it also referred expressly to the reasons for a transfer set out in said accompanying motion for rehearing,* each of which *involved a federal question.* This made it the duty of the State Supreme Court to transfer the cause because in fact it involved a federal question, and when said second motion to transfer was filed, said court had not yet denied the motion for rehearing that accompanied it.

The decision in *Duncan v. Missouri,* 152 U. S. 377, at 383 (38 L. Ed. 485 at 487-488), cited in Respondent's brief

(page 10), is not in point here, because the final decision in the instant case had not been rendered when Petitioner's first motion to transfer was filed. The State Supreme Court was still in a position to grant said motion, and no motion for rehearing addressed to the final decision of the court had been filed or denied.

(6) **Respondent's brief** (pages 13, 14 and 16), **in contending that her rights under the will as adjudged in the instant Kennard case, are in accord with the intent of testator as stated by counsel for Petitioner in his brief in the State Supreme Court in the will construction suit,—repeats the same error inadvertently made by said court in its instant decision, although said error was clearly pointed out and corrected in Petitioner's supporting brief herein** (page 15; see point (1), pages 16-18).

An error inadvertently made by a court but clearly corrected in a brief by indisputable record references and adequate explanation, ceases to be inadvertent when repeated in an answering brief, presumably with knowledge of the correction which demonstrated that the statement in fact made by counsel for Petitioner in his said brief in the State Supreme Court *was not in accord* with the adjudication of Respondent's rights made in the instant case. On the contrary, the intent in fact stated by counsel for Petitioner was quite different (as shown in Petitioner's supporting brief herein, pages 16-18) from that given effect by the instant decision of the State Supreme Court in deciding this Kennard case.

Further concerning the contention made below for Petitioner about the intent of the will,—

(7) **The contention for Respondent, by using the quotation** (on page 14 of her opposing brief), **from the testimony of counsel for Petitioner at the trial below of the instant case** (R. 109), **supplemented by the statement** (page 14 of said brief) **that counsel for Petitioner here asks this Court to review a decision of the State Supreme Court which gave to the phrase "heirs of the body" the exact meaning contended for by Respondent,—is incorrect and is likely to be misleading if not corrected.**

Said quotation is incorrect because it *omits the context,* which shows that counsel for Respondent in thus examining his opponent, was attempting under the pretense of seeking information about the descendants of Liggett, *to commit the witness to an admission that the legal construction of the will being contended for on behalf of Respondent and denied on behalf of Petitioner, was correct.*

The part immediately preceding said quotation reads (R. 109):

> "Q. Now, Mr. Kirby, you were familiar with the family, having represented them for years—descendants of Mr. Liggett—John E. Liggett. You filed this suit for his daughters. His three daughters were Cora B. Fowler, Ella L. Wiggins and Dolly L. Kilpatrick, were they? A. Yes.
>
> "Q. And when did Cora B. Fowler die? A. She died in August, 19——
>
> "Q. (Interrupting) July, was it not? A. In July, 1928. I don't recall the exact date.
>
> "Q. Did she leave any heirs of her body? A. No.
>
> "Q. She did not? A. No.
>
> "Q. Did her two sisters survive her? A. Yes.
>
> "Q. That is, Mrs. Kilpatrick and Mrs. Wiggins survived her? A. Yes."

The part quoted in Respondent's brief, page 14, reads:

> " 'Q. When did Mrs. Kilpatrick die? A. She died in August of the same year.
>
> " 'Q. August, 1928? A. Yes.
>
> " 'Q. Did she leave heirs of her body? A. Yes.
>
> " 'Q. Who were they? A. One of them was her daughter, then Mrs. Perry, Lois Kilpatrick Perry, and the other is the granddaughter, who is the plaintiff in this case' " (R. 109).

And the part immediately following the above, reads (R. 109-111):

> "Q. Now Mrs. Elizabeth Scudder—who is now Elizabeth Scudder Kennard? A. Yes.
>
> "Q. And the other one was Mrs. Perry—Mary Lois Perry? A. Yes.
>
> "Q. She has since remarried, and she is now Mary Lois McIntosh? A. Yes.
>
> "Q. Then, Mr. Kirby, you filed an answer in this case, did you not? A. In which case?
>
> "Q. This instant case that we are now trying? A. I did.
>
> "Q. And in that answer, Mr. Kirby, *you denied that Mary Lois McIntosh and the plaintiff in this case became the heirs of the body of Dolly L. Kilpatrick?* A. I denied your technical contention on that point, because your technical contention was that a person couldn't become the heir of the body of an ancestor until the death of that ancestor had eliminated all questions of contingency about taking effect of the estate, and *I say that she isn't the heir of the body within the sense of vesting the remainders until Mrs. Wiggins, who is still the life tenant and as to the disputed portion of the income, until she dies,* she being *the last to survive of the three daughters of the testator.*
>
> "Q. But then, in point of fact, they did become—these two became the heirs of the body of Dolly Kilpatrick; that is, Elizabeth Scudder and Lois Mary Mc-

Intosh? A. *No, not within—I was answering your technical contention that they became the heirs of the body within the meaning of the will, upon the death of Mrs. Kilpatrick, and I am denying that technical contention because I say that they could not take the remainders; wouldn't vest until the death of the last survivor of the daughters.*

"Q. But you have testified that they became the heirs of her body? A. No, they were her—I have testified here that they were the prospective heirs who survived her, and they are still alive.

"Q. Just a moment. I asked you the question whether or not at her death Dolly L. Kilpatrick left heirs of her body? A. Yes, Mr. Bakewell. *I wasn't thinking that you were trying to ask me a technical question and then trying to hold me to the technical answer meaning* in any manner. In the answer filed in this case I was denying your technical contention on that point.

"Q. *I am asking as a matter of fact concerning the family history here,* and a family which you have represented for years. I am asking you whether or not Dolly L. Kilpatrick at the time of her death left heirs of her body? A. *She left heirs, but they were not heirs of the body within the meaning of this provision of the Will.*

"Q. In order to clarify your answer, Mr. Kirby, what do you mean by 'heirs of the body' with that distinction? A. *I mean they were not heirs of the body within the meaning of all of the provisions of the Will as to when they could take the remainders.*"

It is submitted that the above quoted testimony of counsel for Petitioner, fairly interpreted, gives no support to the contention for Respondent that by said testimony counsel for Petitioner admitted the correctness of Respondent's contention about the proper construction of the Liggett will.

(8) **Respondent's contention** (Brief, pages 13-26) **that on the appeal in the will construction suit, counsel "did not inform" the State Supreme Court that the disputed paragraph was in the will construction decree, is refuted in Petitioner's supporting brief herein, at pages 18-26.**

In the same part of Petitioner's supporting brief, there is a refutation of the additional erroneous statement made in Respondent's brief,—that the briefs of counsel in the appeal from the will decree, "*misled*" the State Supreme Court.

Petitioner's supporting brief (at pages 18-26) proves from indisputable record evidence, that the judge who wrote the decision in the will construction case was not misled, and could not have been misled, into affirming the will decree.

(9) **The statements** (Resp.'s brief, at foot of page 14) **that "the judge who tried the will construction suit testified that the devolution of the contingent remainders if a daughter should die without issue," was not argued in the trial court** (R. 134), **and that "Petitioner has so stipulated** (Phys. Ex. *521)," **are not correct and are likely to mislead if not corrected.**

The State Circuit Judge (Hon. Franklin Miller), who tried the will construction suit, testifying as a witness about occurrences at said trial, and after naming an attorney who had "appeared at the arguments", said (R. 134):

> "On December 17, 1921, it was *argued at great length* by many able counsel. The only question argued was whether the daughters of the testator took life estates or estates in fee simple. Counsel did not argue the nature or limitations of the estates in remainder after the life estates of the daughters."

Obviously the arguments here referred to were *oral* arguments made during the trial in the circuit court. But it is also a fact, undisputed of record, that in said circuit court and cause, and in the trial brief filed by the attorney for the guardian ad litem of Mrs. Kennard, he made the following contention or argument concerning the devolution of the share of a daughter who might die without issue, viz.: that it was the intent of the Liggett will that upon the death of testator's widow, the trustees should,

> "Further hold said stock in trust for the sole benefit and behalf of his three daughters in equal portions, share and share alike, for and during their natural lives, with remainder over on the death of each daughter of that one's share to the heirs of her body absolutely, per stirpes; and *if none, then to pay the income from such share to his surviving daughter or daughters for life, such share on the death of the last surviving daughter to go to the heirs of the body of such as should die leaving such issue*" (Phys. Ex. *441-442).

This was part of said attorney's *argument* made to the circuit court concerning the intent of the will. It supported a similar contention made in his answer filed in the circuit court in the will construction suit on behalf of Mrs. Kennard (Phys. Ex. *213-214).

Moreover, during the trial in the state circuit court of the instant suit, and while counsel for Respondent was examining counsel for Petitioner, the following occurred, (R. 132-133):

> "Q. Well, Mr. Kirby, as attorney for Mrs. Wiggins, you have heretofore signed a stipulation, have you not, which states that the devolution of this property in the event a daughter should die without issue *had not even been discussed* in the case before Judge Miller? A. Oh, you are referring—you are referring to *oral*

argument. I have tried to remind you that Mr. Reber's brief and Mr. Reber's answer in that case in my opinion settled this controversy.

"Q. I understand you signed such a stipulation; *you said this matter hadn't been discussed* before Judge Miller? A. Read the stipulation as to whether or not it meant oral argument."

[Counsel here read from said "stipulation of facts," as shown below in single quotes, but in doing so made certain slight changes in the wording, and also *omitted the following sentence* that immediately preceded the excerpt thus read by him into the record (Phys. Ex. *521):

"That *said cause came on to be heard* and *was duly tried and submitted* upon the issues made by the pleadings *and upon the* evidence, briefs and *oral* arguments"]. The part read into the trial record follows:

"Q. 'That at the trial of said cause in the Circuit Court the only question that was argued was whether the daughters of the testator took life estates or estates in fee simple, but in the argument of this question, the entire scheme or plan of the will and all its provisions throwing light on the design and specific intent of the testator were also drawn into consideration and were discussed, but that there was no argument made to the Court as to the nature or limitations of the estates in remainder after the life estates of the daughters in case the Court should say that the daughters took life estates; that later a motion for a new trial and arrest of judgment were submitted without argument.' You signed a stipulation so reciting? A. *Yes, that refers, as both of us understood, to oral argument,* because the same stipulation contained a memorandum about the nature of Mr. Reber's answer.

"Mr. Bakewell: I see. I think that is all, Mr. Kirby" (R. 132-133).

The stipulation was signed by present counsel for respondent herein (Phys. Ex. *522); it was filed in the fed-

eral district court in Mrs. McIntosh's first federal suit, *Perry v. Wiggins* (Phys. Ex. *510).

It is submitted that the foregoing portions of the record prove the complete fallacy of said statements in Respondent's opposing brief.

(10) **Petitioner challenges the statement and contention in Respondent's brief** (pages 15-16) **to the effect that the presence in the will decree of the disputed paragraph therein, was legally attributable to "an agreement" between counsel for the guardian ad litem of Respondent and counsel for Petitioner, rather than to the judicial act of the circuit court in knowingly approving the draft of decree presented to Judge Miller by the said guardian's attorney who had been directed to draft the form of decree, and in causing said draft to be entered of record after Judge Miller had read it.**

The impression sought to be created by the said statement and contention, supplemented by the paragraphs and citation at the top of said page 16, is that the alleged agreement between counsel was of such collusive and deceptive nature as to render said paragraph invalid as a fraud on said court, when exposed to later judicial scrutiny.

A summary statement of the circumstances showing how said disputed paragraph came to be inserted into the draft for decree drawn by counsel for Respondent, is made in Petitioner's petition for a writ herein (page 11, last paragraph, through page 14, first paragraph). From said summary statement it is clear that the method adopted in drafting and settling the terms of the decree were strictly in accord with the customary practice in said circuit court, of preparing, adopting and entering complicated decrees in equity cases. There was not the slightest impropriety or irregularity or conspiracy or concealment in what was

done. Nothing was concealed from other counsel, nor from Judge Miller, nor misrepresented to him. The testimony of Judge Miller appears at R. 134-137. The testimony of counsel for Mrs. Kennard's guardian, who drew the decree and submitted it to Judge Miller for the latter's approval, appears at R. 162-163. The testimony of counsel for Mrs. Wiggins appears at R. 101-102, supplemented at R. 129, by his testimony that he did not write the decree. In addition, the present counsel for Mrs. Kennard and counsel for Mrs. Wiggins signed and filed a written "stipulation of facts" on which was tried Mrs. McIntosh's first federal suit and in which stipulation the facts were stated in detail (Phys. Ex. *521-522). Furthermore, the attorney who represented Mrs. Kennard's guardian ad litem, made additional statements in his filed "Suggestions" as amicus curiae in the State Supreme Court in the instant case, (R. 290; 298-299).

If counsel for Mrs. Wiggins had agreed with counsel for Mrs. Kennard's guardian that the form of the decree approved by them would be entered and *if it had been entered pursuant to such agreement,* the decree as so entered would as to them have been *"a consent decree."* But counsel for Mrs. Kennard, in said "stipulation of facts" agreed that Mrs. Wiggins' counsel *"did not consent to the entry of the decree"* (Phys. Ex. *522).

It is significant that the above contention for Respondent was before the State Supreme Court in the instant Kennard case, and although said court, as shown by its successive decisions herein, was seeking some valid ground on which to sustain the decree of the state circuit court in favor of Mrs. Kennard and against Mrs. Wiggins, the State Supreme Court did not even mention, much less adopt or sustain, the above contention. It is respectfully submitted that the above cited facts of record, show that

said contention is an effort to distort into collusive and fraudulent conduct, the entirely proper, open and customary method in Missouri of drafting and settling complicated decrees in equity. The contention should fail for this additional reason.

In conclusion, the attention of the Court is directed to the fact that the opposing brief herein for Respondent fails to answer the contention in Petitioner's supporting brief that the decision and judgment of the State Supreme Court in the instant Kennard case unlawfully deprived Petitioner of her property without due process of law, although the undisputed record, and the final decision of said State Supreme Court, show clearly that Petitioner committed no wrong against Respondent.

Respectfully submitted,

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